

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 5636 OF 2004
IN
CRIMINAL APPEAL NO. 1504 OF 2004

Sirajmiya @ Raju Nalwala M. Sayyed. .. Applicant

Vs

The State of Maharashtra. .. Respondent

Mr. Hakim Salim A.R. for the applicant.

Mrs. V.R. Bhosale, APP, for the respondent-State.

**CORAM: S.B. MHASE &
ANOOP V. MOHTA, JJ.**

DATED: 20TH DECEMBER, 2004

P.C. :

1. Heard Mr. Hakim Salim for the applicant.

2. This is an application seeking suspension of the sentence passed in Sessions Case No. 116 of 1993 by the Sessions Judge, Greater Bombay, on 19th October, 2004. The applicant-accused has been convicted for an offence under Section 376 of IPC and sentenced to suffer R.I. for life and to pay fine of Rs.1,000/- and, in default, to suffer RI for three months. He is also convicted under Section 306 of the IPC and is sentenced

to suffer RI for ten years and to pay fine of Rs.1,000/-. The incidence is dated 19th October, 1992. The deceased Gulnar, aged 15, is a victim in the present case. The applicant has raped her against her will. However, after the rape was committed, the deceased girl committed suicide by pouring kerosene on herself and setting herself on fire. There are two consistent dying declarations on record, one recorded by the Police Officer and the second recorded by the S.E.M. i.e. Special Executive Magistrate. Very agonizing facts have been deposed by the deceased girl. The deceased girl was an orphan. She was brought up in the family of the accused. The wife of the accused Smt. Shenaaz was looking after the deceased since childhood. The deceased was calling Shenaaz as "Shenaaz Apa" and referring to the accused Siraj as brother-in-law. At the relevant time, Shenaaz was not at home as the elder son of Shenaaz and Siraj was admitted in a private hospital. The two daughters of the accused viz. Sana and Najma had gone to their grandmother's house at Shivaji Nagar, Mumbai. The two small children viz. Asma and Mohammed Raza were in the house, so also the accused. She further submits that on that night, the accused returned home at about 11.00 p.m. and he was under the influence of liquor. The accused slept on the cot in the room and at that time, he was in a baniyan

and lungi. Asma and Mohammed Raza, the two small children, who were less than of 8 years age, had slept on the mattress near the cot and the deceased slept at the other end on the floor. At about 1.00 a.m., she woke up as she felt that somebody had slept besides her. Then she realised that he was Siraj (the accused). The accused removed her salwar, slept on her, pressed her breasts and committed rape upon her. She tried to shout, but he pressed her mouth by his hand. She caught hold of the hair of his head, but he did not pay any heed to her resistance and completed the act of forcible intercourse. He removed himself from her person, opened the door of the house and went out. The deceased felt dejected, humiliated and spoiled. This worsened her thoughts to the extent that she thought there was no point in living in this World anymore. In the heat of the moment, she picked up the kerosene can which was in the house, poured kerosene on her person and set herself ablaze. Thereafter, there was hue and cries. The fire was extinguished and she was taken to the hospital.

3. The story revealed from this dying declaration is agonizing and is a blot on the society. The learned counsel appearing for the applicant, after going through the evidence of the Medical Officer, the S.E.M. and that of the Investigating Officer, who has recorded

these two dying declarations, tried to point out that there is variance in the timings given by these witnesses while recording the dying declarations and making endorsements by the doctor and thereby, it is submitted that the dying declarations are doubtful one. Our attention was also invited to the statement of the deceased, which is reflected from the doctor's evidence, that at the time of the admission in the hospital, the deceased had narrated the story of an accidental death. What we find is that all this material is of no help to the present accused-applicant. The variance in the timings of making endorsements etc. have taken place, not as a result of preparing any concocted document or dying declaration, but this is only because of lapse of memory. The incidence is of October 1992, as against the statement of these witnesses, which have been recorded sometime in August 2002 and 2003. Therefore, if you ask a Police Officer or an S.E.M. or, for that matter a doctor, who must have recorded number of statements during this period, the minute details about time etc., they are likely to commit mistakes. Such mistakes cannot be fatal to the prosecution so as to make the case doubtful. Some latitude will have to be given to the loss of memory of such witnesses. So far as the statement made by the deceased at the time of admission to the hospital is concerned, we cannot forget

that the deceased had no parents. The deceased did not even know the names of her father and mother. Even the accused and his family members have not given the name of the father and mother of the deceased and they were only addressing the deceased as "Gulnar". She was brought up by them and, therefore, was under their obligation. It is submitted that she was admitted to the hospital by the accused and other members of the family. Naturally, they were the persons present at the time of admission and under their influence, the deceased must have stated that it was accidental. However, when she was independent, she has given the true dying declaration, one to the Police and other to the S.E.M. It is pertinent to note in this case that as deceased had no relations, there is no one to tutor her to depose as against this accused-applicant. It only appears that when the influence of accused is removed, the deceased has come forward in a categorical manner and has given a detailed version of the acts committed by the accused and ultimately, has succumbed to death. No doubt, the accused was on bail during trial. But, after going through the evidence, now he has been found to be guilty with two dying declarations, which have inspired confidence with the Sessions Judge and which, prima facie, inspires confidence with us also.

4. A very heinous crime has been committed as against an orphan girl, probably with an impression that she will accept the injustice done to her and stay in the family meekly accepting the act of rape and other sexual advances made by the accused-applicant. However, the deceased girl selected to die by setting herself on fire than to accept a humiliated life in the family of the accused-applicant.

5. Under these circumstances, we do not find that there is any case for bail and suspension of sentence. The application is rejected.

[ANOO P V. MOHTA, J.]

[S.B. MHASE, J.]

[srpasha@hc]